

February 20, 2008

Mr. Phillip J. McGinnis  
555 East Loockerman Street  
Dover, DE 19901

Re: **Freedom of Information Act Complaint  
Against Kent County Levy Court**

Dear Mr. McGinnis:

On November 21, 2007, the Delaware Department of Justice (“DDOJ”) received your complaint alleging that the Kent County Levy Court (“Levy Court”) violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Ch. 100 (“FOIA”), by holding a series of meetings in November 2007 with County Planning Staff and members of a Comprehensive Plan Update Working Group without notice to the public.

On November 25, 2007, the DDOJ received a letter from John W. Paradee, Esquire with information in support of your FOIA complaint. By letters dated November 26 and 27, 2007,<sup>1</sup> we forwarded a copy of your FOIA complaint and Mr. Paradee’s letter to the Levy Court’s counsel

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<sup>1</sup> As explained in our letter of November 27, 2007, “[the DDOJ] is not treating Mr. Paradee’s letter as a separate complaint but we are enclosing a copy of that letter [to the Levy Court’s legal counsel] as it might contain information pertinent to the Levy Court’s response to [Mr. McGinnis’] FOIA complaint.”

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to respond by December 6, 2007. The Levy Court's counsel asked for a brief extension of time which we granted, and we received the Levy Court's response on December 10, 2007.

The DDOJ received a second letter from Mr. Paradee dated January 10, 2008 with additional information which we forwarded to the Levy Court's legal counsel on January 17, 2008. We received the Levy Court's response on January 30, 2008. On February 7, 2008, we asked the Levy Court for additional information which we received that same day.

According to your complaint, the State certified Kent County's current Comprehensive Plan in 2002 and by law the "County is required to update its Comprehensive Plan every five (5) years. Consequently, Kent County is required to update its Comprehensive Plan in the current year [2007] and has, for the last several months, been engaged in activities supporting the Comprehensive Plan revision."

You allege that sometime after October 2, 2007 "the Director of the Planning Office and at least one Working Group member – possibly the Chair of the Working Group – have engaged in a series of nonpublic subquorum meetings with individual members of the Levy Court in an effort to reach a consensus among the Levy Court concerning the planning vision to be embodied in the Comprehensive Plan revision." You allege that "the individual members of the Levy Court have been receiving and commenting upon other members' thoughts and opinions in order to reach a consensus."

In its initial response to your FOIA complaint, the Levy Court acknowledged there were "a series of five briefings between the Director of Planning Services, two members of the Comprehensive Plan Update Working Group, the County Administrator and the Levy Court Commissioners." The Levy Court contends these were not "meetings" as defined by FOIA "because

there was never a time when a quorum of the Levy Court Commissioners was present.” According to the Levy Court:

On November 13, 2007, Director Sarah Keifer, Gregg Moore and Bob Shuba of the Working Group met with County Administrator Michael Petit de Mange, and Commissioners Eric Buckson and Richard Ennis for approximately one hour. On November 14, 2007, Director Keifer and Mr. Shuba met with Commissioner Brad Eaby and President Brooks Banta for approximately ninety minutes. On November 20, 2007, Director Keifer, Mr. Shuba and Andy Strine (another Working Group member) held a series of briefings with Commissioner Harold Brode for 30-35 minutes, with Commissioner W.G. Edmanson for 30-35 minutes and Vice President Allan Angel for 30-45 minutes. These briefings occurred over the course of approximately two hours. Commissioner Brode’s session overlapped by approximately ten minutes with Commissioner Edmanson’s session. Commissioner Edmanson’s session overlapped with Vice President Angel’s session by less than five minutes.

Mr. Paradee provided us with an e-mail dated November 10, 2007 from Mr. Strine stating that these five sessions were planned in advance “to build a majority consensus” on updating the County’s Comprehensive Plan. In that e-mail, Mr. Strine stated:

[T]he group felt it was good to get more personalized feedback from each commissioner, and help them understand what we have come up with. It needed to be done in a way so the commissioners were not “on stage,” and felt the need to talk to the crowd, so to speak. Gregg [Moore], Sarah [Keifer], and Bob [Shuba] are meeting one on one with each commissioner, on an informal basis. . . The goal is to make sure we are getting buy in from the majority of the commissioners, help them understand what went into this process and why we have come up with what we have. Also so they feel their input is heard as well as to let them know and understand. The consensus was this is a better way to keep moving forward, as opposed to laying it on them as a finished document, which they feel doesn’t have their input taken into consideration. . . I think it’s a good path forward, and

hopefully will build a majority consensus.

### **RELEVANT STATUTES**

FOIA requires that “[e]very meeting of all public bodies shall be open to the public except those closed for” executive session as authorized by law. 29 *Del. C.* §10004(a).

FOIA defines a “meeting” as “the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.” *Id.* §10001(e).

### **LEGAL ANALYSIS**

“[The DDOJ] has previously determined that a public body may achieve a quorum for purposes of FOIA through serial discussions which allow members of a public body ‘to receive and comment on other members’ opinions and thoughts, and reach a consensus on action to take.’” *Att’y Gen. Op.* 06-ID20, at p.2 (Sept. 11, 2006) (quoting *Att’y Gen. Op.* 03-IB11, at p.4 (May 19, 2003)). “For serial discussions to amount to a constructive quorum, there must be ‘an active exchange of information and opinions’ as opposed to ‘the mere passive receipt of information.’” *Id.*

“‘It is the nature, timing, and substance of the communications which together may turn serial discussions into a constructive quorum.’” *Att’y Gen. Op.* 06-ID20, at p.2 (quoting *Att’y Gen. Op.* 06-ID16, at p.4 (Aug. 7, 2006)). “Serial discussions may amount ‘to a constructive quorum of the public body when there was an interactive exchange of thoughts and opinions and members were asked to vote or adopt a particular point of view or reach a consensus on what action to take.’” *Id.*

In *Att’y Gen. Op.* 04-IB17 (Oct. 18, 2004), a member of the New Castle County Council drafted a memorandum proposing to allocate \$15 million to the City of Wilmington for law

enforcement and then circulated a copy of the proposal to the other six members of the Council. Four members of the Council signed the proposal which stated that “it represents a consensus” arrived at after a series of one-on-one telephone conversations by members of the Council. The DDOJ determined “that those serial telephone calls amounted to a meeting of a quorum of the Council in violation of the open meeting requirements of FOIA.” *Att’y Gen. Op.* 04-IB17, at p.4.

In *Att’y Gen. Op.* 05-IB03 (Feb. 3, 2005), a member of the Town Council drafted a letter critical of another Council member and circulated the letter to three members of the five-member Council, following up with telephone or face-to-face conversations to see if the other three members agreed with her position. The DDOJ determined that “these contacts were more than passive receipt of information” and “the sum of these communications amounted to a meeting by a public body covered by FOIA.” *Id.* at p.6.

In *Att’y Gen. Op.* 06-ID20, two members of the seven-member School Board met with the Superintendent on the morning of July 10, 2006 to discuss reduction in force and tax warrant issues. Three other members of the Board met with the Superintendent later that same morning to discuss those same issues. The DDOJ determined that “these two meetings amounted to a constructive quorum for purposes of FOIA. The meetings were scheduled only a few hours apart, the subjects discussed were the same, and the School Board acknowledges that the meetings ‘went beyond the mere passive receipt of information.’” *Id.* at p.3.

The Levy Court contends that the DDOJ’s “constructive quorum” analysis does not square with the plain language of FOIA which defines a “meeting” to mean only “a quorum of the members of any public body.” 29 *Del. C.* §10002(b). The Chancery Court, however, has stated that a series of subquorum meetings might violate FOIA if designed to “circumvent[] the Freedom of Information

Act.” *Tryon v. Brandywine School District Board of Education*, C.A. No. 11161, 1990 WL 51719, at p.3 (Del. Ch., Apr. 20, 1990) (Hartnett, V.C.). A series of subquorum meetings might violate FOIA if used “to convince any Board member to adopt a particular point of view” or “to try to sway the Board members’ votes.” 1990 WL 51719, at p.3.

The DDOJ continues to believe that the open meeting requirements of FOIA may apply when a public body meets in a closely related series of subquorum groups, and we believe that the courts in Delaware (like the courts in other states) would apply a constructive quorum analysis in the appropriate circumstances.<sup>2</sup> Therefore, we look to the nature, timing, and substance of the communications between the members of the Levy Court, the County’s Planning Staff, and the Comprehensive Plan Update Working Group in November 2007 to determine whether, taken together, those five gatherings amounted to a constructive quorum of the Levy Court.

The Levy Court acknowledges that the following five gatherings took place in November 2007:

Date: November 13, 2007

In attendance: Planning Director Sarah Keifer  
County Administrator Michael Petit de Mange

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<sup>2</sup> See *Wood v. Battle Ground School District*, 27 P.3d 1208 (Wash. App. 2001); *Del Papa v. Board of Regents of the University & Community College System*, 956 P.2d 770 (Nev. 1998); *State ex rel. Cincinnati Post v. City of Cincinnati*, 668 N.E.2d 903, 906 (Ohio 1996) (the open meeting law does not permit a public body “to circumvent the requirements of the statute by setting up back-to-back meetings of less than a majority of its members, with the same topics of public business discussed at each”); *Booth Newspapers, Inc. v. Board of Regents of the University of Michigan*, 507 N.W.2d 422 (Mich. 1993); *State ex rel. Newspapers, Inc. v. Showers*, 398 N.W.2d 154 (Wis. 1987); *Moberg v. Independent School District No. 281*, 336 N.W.2d 510, 518 (Minn. 1983) (“serial meetings in groups of less than a quorum for the purpose of avoiding public hearings or fashioning agreement on an issue may also be found to be a violation of the statute depending on the facts of the individual case”); *Blackford v. School Board of Orange County*, 375 So.2d 578 (Fla. App. 1979).

Working Group members Gregg Moore and Bob Shuba  
Commissioners Eric Buckson and Richard Ennis

Duration: one hour

Date: November 14, 2007

In attendance: Planning Director Sarah Keifer  
Working Group member Bob Shuba  
Commissioner Brad Eaby and President Brooks Banta

Duration: 1 ½ hours

Date: November 20, 2007

In attendance: Planning Director Sarah Keifer  
Working Group members Bob Shuba and Andy Strine  
Commissioners W.G. Edmanson and Harold Brode  
and Vice President Allan Angel

Duration: 2 hours (three back-to-back overlapping meetings)

According to the Levy Court, all five of these gatherings took place at the Kent County Administrative Complex, and “[s]cheduling arrangements were handled by Kathy Phinney, a County employee in the Administration office, at the request of [Planning] Director Keifer.” The record shows that these were not unplanned, routine discussions between members of the Levy Court and staff, but rather were scheduled in advance for the purpose of discussing the County’s Comprehensive Plan Update to avoid (quoting Mr. Strine’s November 10, 2007 e-mail) being “on stage” and the “need to talk to the crowd.”

The record also shows that these gatherings were not intended for the mere passive receipt of information by the Levy Court from its staff about the Comprehensive Plan Update. According to Mr. Strine’s November 10, 2007 e-mail, the gatherings were designed to “get more personalized

feedback from each commissioner” and to get “buy in from the majority of the commissioners” in order to “build a majority consensus.”

The Levy Court contends that the five gatherings did not amount to a constructive quorum because “Staff did not inform other Commissioners of opinions or thoughts expressed by other Commissioners who attended different briefings. There was no attempt to reach a consensus on what action to take.”

The Levy Court acknowledges, however, that “[n]o County employee took notes, minutes, etc.” of the discussions at those five gatherings and “there was no [audio] recording.” Without such contemporaneous proof, there is no evidence in the record to support the Levy Court’s contention that “[t]here was no attempt to reach a consensus on what action to take.”

Indeed, as Mr. Paradee points out, we can infer that a quorum of the Levy Court reached a consensus on changes to the Comprehensive Plan by comparing the draft of the plan available to the public as of October 10, 2007 with the draft made available to the public on January 2, 2008. According to Mr. Paradee, there were “significant differences in the substantive portions of the draft document, including a dramatic change in the underlying densities permitted within areas designated as within the County’s ‘growth zone’ (from 1 unit per acre to 1 unit per 5 acres).”

The record shows that the five serial gatherings between all seven of the members of the Levy Court, County Planning Staff, and members of the Working Group were structured to avoid meeting in public to discuss the County’s Comprehensive Plan Update. The record shows that these gatherings did not involve the passive receipt of information by members of the Levy Court, but an interactive exchange of views in order to get the Commissioners’ “input.” The record shows that the gatherings were intended to “build a majority consensus” as reflected in substantive changes to the



Comprehensive Plan Update.

We do not mean to suggest that every step of the legislative drafting process must be open to the public.<sup>3</sup> Nor do we mean to suggest that individual members of a public body cannot receive staff briefings for informational purposes. The record in this case, however, shows that the Levy Court crossed the line from passive receipt of information to an interactive exchange of views in order to build a majority consensus on changes to the County's Comprehensive Plan.

The DDOJ determines that the Levy Court violated the open meeting requirements of FOIA when all seven members of the Levy Court met privately in a series of five subquorum meetings without notice to the public. The nature, timing, and substance of those communications amounted to a meeting of a constructive quorum of the Levy Court without notice to the public in violation of FOIA.

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<sup>3</sup> In *Att'y Gen. Op. 05-IB13* (May 9, 2005), the DDOJ determined that a public body did not have to make publicly available a "working draft which the author is still revising prior to presentation to a public body." *Id.* at p.3. However, "once the author of a document presents it to a public body for review, then it becomes a public record even though it is in draft form and may be subject to further change at the direction of the public body." *Id.*

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### **CONCLUSION**

For the foregoing reasons, the DDOJ determines that in a series of five meetings over the course of November 13, 14, and 20, 2007, all seven members of the Levy Court met with the Planning Director and members of the Comprehensive Plan Update Working Group to discuss revisions to the County's Comprehensive Plan, which resulted in a majority consensus among the Levy Court on substantive changes to the Plan. We determine that the nature, timing, and substance of these serial subquorum meetings amounted to a meeting of a constructive quorum of the Levy Court without notice to the public in violation of the open meeting requirements of FOIA.

Very truly yours,

Judy Oken Hodas  
Deputy Attorney General

APPROVED

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Lawrence W. Lewis, Esquire  
State Solicitor

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